Supreme Court of the United States

OCTOBER TERM, 1939.

No. .....

GERTRUDE VANDERBILT WHITNEY and CORNELIUS VANDERBILT, as Executors of the Last Will and Testament of ALICE G. VANDERBILT, deceased, and said CORNELIUS VANDERBILT, individually, GLADYS SZECHENYI, CATHLEEN VANDERBILT LOWMAN, GLORIA LAURA MORGAN VANDERBILT, infant, and THOMAS B. GILCHRIST, as General Guardian of the property of said infant,

Appellants,

against

STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Appellee.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

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Appellants,

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STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Appellee.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Pursuant to Rule 7 of the Revised Rules of this Court, the appellants in the above entitled case present this brief opposing the motion of appellee to dismiss or affirm.

I. The only issue raised by the motion is whether the questions involved have already been settled by this Court adversely to the appellants.

Where, as here, jurisdiction of this Court is invoked by appeal as of right, an argument as to the merits of the cause is out of place on a motion to dismiss or

affirm, and the appellants do not propose in this brief to present such an argument.

As the sole reason set forth in support of the motion is the want of a substantial federal question, the motion should be granted only if argument on the merits would be a waste of time, either because the questions involved are frivolous or because they have been foreclosed by prior decisions of this Court. *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311 (1902).

Appellee makes no contention that the questions presented are frivolous. Such a contention could scarcely have been made in the face of the declaration of the New York Court of Appeals that:

> "The serious question in this case is whether the tax violates the Constitution of the United States." (*Matter of Vanderbilt*, 281 N. Y. 297, 313.)

Appellee seeks to show, rather, that the questions have already been settled against the appellants by prior decisions of this Court. In this brief the appellants have therefore limited themselves to answering such contention.

II. The questions presented have not been settled adversely to the appellants by this Court.

a. **The due process question.** Appellants' first contention is that the due process clause of the Fourteenth Amendment does not permit the inclusion in the estate of a decedent, for the purpose of measuring a progressive estate tax, of property in which the decedent never had any beneficial interest, and with which the de-

cedent's only connection was that the decedent had, and exercised, a special or limited and wholly non-beneficial power of testamentary appointment. Appellee's contention on this motion is that this question is settled adversely to the appellants by *Orr* v. *Gilman*, 183 U. S. 278 (1902) and *Chanler* v. *Kelsey*, 205 U. S. 466 (1907).

These cases, however, are not in point. They both involved the old New York death tax statute which was completely superseded by the new statute involved in the present appeal. The former New York death tax was a legacy tax, by which we mean a tax imposed on the right of the recipient to receive property on a death, and measured by the amount of property so received. The present tax is an estate tax, by which we mean a tax imposed on the right of the decedent to transmit property at death, and measured by the amount of property so transmitted. While the terms used to describe these two wholly different kinds of death taxes are not uniform (see dissenting opinion of Mr. Justice Roberts in *Coolidge* v. *Long*, 282 U. S. 582 (1931) at 608), the fundamental distinction between the kind of tax to which we refer as a legacy tax and the kind to which we refer as an estate tax is well-established and has been repeatedly recognized by this Court. Thus, in the leading case of *Knowlton* v. *Moore*, 178 U. S. 41 (1900), the Court referred (p. 77) to the confusion which

> "arises from not keeping in mind the distinction between a tax on the interest to which some person succeeds on a death and a tax on the interest which ceased by reason of the death, the two being different objects of taxation."

See also:

Y. M. C. A. v. *Davis,* 264 U. S. 47, 50 (1924);
Edwards v. *Slocum,* 264 U. S. 61, 62-3 (1924);
Saltonstall v. *Saltonstall,* 276 U. S. 260, 270-1 (1928).

The significance attributed to this distinction by Justices of this Court is strikingly shown by the cases of *Nichols* v. *Coolidge,* 274 U. S. 531 (1927) and *Coolidge* v. *Long,* 282 U. S. 582 (1931), which involved, respectively, a Federal estate tax and a Massachusetts legacy tax in respect of precisely the same property. In both cases the tax was held invalid, but in the *Nichols* case, involving an estate tax, Justices Holmes, Brandeis, Stone and Sanford concurred in the result, whereas in the *Long* case, involving a legacy tax, Justices Holmes, Brandeis and Stone joined with Mr. Justice Roberts in dissenting from the decision. The dissenting opinion in the *Long* case expressly distinguished the *Nichols* case on the ground that the *Nichols* case involved an estate tax rather than a legacy tax (see 282 U. S. at 609, 622-3).

In the present case, the distinction between a legacy tax and an estate tax is of decisive importance. Where a legacy tax is imposed on the exercise of a power of appointment by the grantee, it is immaterial whether the grantee of the power had, or had ever had, any beneficial interest in the property subject to the power, because the tax is imposed on the receipt of the property by the appointee and the property is not received by the appointee until the power has been exercised. The appointee cannot complain if the State

selects the exercise of the power as the occasion for the tax on his undoubted receipt of the property. And this is all that is decided by *Orr* v. *Gilman* and *Chanler* v. *Kelsey,* relied upon by appellee.

Where, however, an estate tax is being imposed, the treatment of appointed property as part of the estate being transmitted by the grantee of the power, for the purpose of an estate tax on the transmission of the grantee's estate, involves an assumption that the grantee stood in a relation to the property which may reasonably be treated as the substantial equivalent of ownership thereof. It is our contention that this assumption is erroneous and arbitrary in a case like the present where the grantee of the power had never owned the appointed property and where the power was a special or limited one and wholly non-beneficial.

Prior to the enactment of the tax statute here involved, the State of New York had never undertaken to impose an estate tax upon the exercise of a special or limited power of appointment. No estate tax upon the exercise of such a power has ever been imposed by the Federal Government.

In an effort to avoid the clear distinction between the *Orr* and *Chanler* cases and the present case, appellee cites a number of cases for the proposition that to sustain the validity of an estate tax "it is not necessary that the decedent own the property or be able to derive some economic benefit therefrom" (p. 2). However, in all of the cases cited, the property involved had once belonged to the decedent or had been paid for by him, and the decedent by one device or another had kept control over it up to the time of his death. Since, in each of these cases, the whole transaction was a sub-

stitute for a testamentary disposition by the decedent of his property, the imposition of the estate tax was justified on the principle that the Legislature might properly take measures reasonably required to prevent evasion of the tax. However, where, as in the present case, the decedent had never owned or paid for the property in question, there is no basis for the application of any such principle.

While this Court, by virtue of the principle just stated, has upon occasion sustained the inclusion in a decedent's estate, for the purpose of an estate tax, of property in which the decedent did not have any beneficial interest at death, *this Court has never, so far as we can find, sustained the inclusion in a decedent's estate, for the purpose of an estate tax, of property in which the decedent had never had any beneficial interest, either at death or at any previous time.* This appeal presents just such a case.

b. **The first equal protection question.** Appellants' second contention is that, even if the predication of a tax upon the arbitrary and erroneous factual assumption that the appointed property belonged to the decedent could be regarded as consistent with due process of law (so that the Federal Government might impose such a tax), nevertheless the tax statute is invalid under the stricter requirements of the equal protection clause because of the inequality produced by application of this factual assumption.

Appellee asserts that *Stebbins* v. *Riley*, 268 U. S. 137 (1925), negatives the contention that the equal protection clause subjects the States to an additional requirement of fairness and equality over and above

that which is required of both the State and Federal Governments by the due process clauses of the Fifth and Fourteenth Amendments. However, not only is there nothing in the *Stebbins* opinion to support such an assertion, but Mr. Justice Stone, who wrote for the Court in that case, has expressly stated the contrary view. *Heiner* v. *Donnan,* 285 U. S. 312, 338, 347-8 (1932) (dissenting opinion). As was said in *Truax* v. *Corrigan,* 257 U. S. 312, 332 (1921), where it was held that the equal protection clause forbade withdrawal of certain equitable remedies even if the due process clause allowed it:

> "The due process clause * * *, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty, and property, which the Congress or the Legislature may not withhold. * * * *But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause,* or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty." [Italics supplied.]

Appellee's quotation from the opinion in *Chase National Bank* v. *United States,* 278 U. S. 327, 338-9 (1929) has no bearing upon the appellants' first equal protection objection. Appellants do not contend, as appellee seems to believe, that even if the due process clause permits the appointed property to be considered as belonging to the decedent for estate tax purposes, an independent *due process objection* arises by reason of the fact that inclusion of the appointed property causes

the estate to fall into a higher tax bracket. Appellants contend, rather, that even if the due process clause offers no obstacle to such inclusion, there remains a question whether the discrimination so produced is compatible with the stricter requirements of the equal protection clause. This argument was not open to the taxpayer in the *Chase National Bank* case, which involved a federal tax; the equal protection clause does not run against the Federal Government. The specific guaranty of equal protection of the laws as contained in the Federal Constitution applies by its terms to the States, and it is a State tax statute which is involved in the present appeal.

c. **The second equal protection question.** Appellants' final contention is that the tax statute here involved violates the equal protection clause for another and separate reason: it results in the different treatment of two estates which are identical in all material respects, differing only in that one includes property passing under a special or limited power of appointment created before September 1, 1930, and the other includes property passing under a special or limited power created after that date.

Appellee points to the circumstance that on September 1, 1930, the old New York legacy tax system, which provided for taxation of the right to receive appointed property as of the time of the exercise of the power, was replaced by an estate tax system, under which the right to transmit property by way of a power of appointment was taxed in the estate of the donor of the power as of the time of his death; that by such new system no provision was made for taxation with

respect to special or limited powers theretofore created but not yet exercised; and that it was therefore necessary for the State to adopt some method of reaching property passing under special or limited powers created before and exercised after September 1, 1930, which would otherwise escape all taxation. Appellee then cites four decisions of this Court which hold (or suggest by way of dictum) that, in such a situation, the State can impose a special levy which, although it seems *prima facie* arbitrary and violative of the equal protection clause because it singles out a particular group of properties or transactions, is, in view of all the circumstances, lawfully appropriate to the end in view.

But these four cases stand only for the proposition that a State may adopt a classification based on the need to prevent particular types of property or transaction from *escaping* taxation, and to make them bear a fair share of the tax burden—a proposition which appellants do not feel called upon to deny.* The question is not whether the transfer of the appointed property can be subjected to *any* tax; the question is whether the tax imposed is a fair one. Certainly this Court has not held that, when seeking to close a loophole in a tax statute, a State may ignore the equal protection requirement to which it is subject in all other fields of action.

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* Indeed, appellants expressly urged in their briefs presented to the State Courts, that the appointed property not only *could* constitutionally be subjected to a legacy tax in relation to the estate of the donor of the power, but that as a matter of statutory construction, it should be so taxed. The appellants pointed out further that if such a tax should now be held to be due, it is not too late to collect it.

Appellee further states that *Binney* v. *Long*, 299 U. S. 280 (1936), is inapplicable here. Appellants believe that the *Binney* case is precisely in point, and that the alleged ground of distinction which appellee urges has as much application to the facts of the *Binney* case as to the situation here involved. However, for the purpose of the present motion, it is not necessary to enter into a detailed comparison of the two cases. It is sufficient to point out that the *Binney* case was a decision *against* the validity of a tax, and therefore cannot possibly be thought to foreclose the second equal protection question *against* the appellants.

For the foregoing reasons the appellants respectfully submit that the questions presented are clearly not frivolous and are not foreclosed by prior decisions of this Court, and that the case should therefore stand for argument on the merits.

Respectfully submitted,

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